89-1107



No.: _____

IN THE

# Supreme Court of the United States

**October Term, 1989**

PHILIP SCHWAB,

*Petitioner,*

-against-

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the harmless beyond a reasonable doubt harmless error test should be applied when a prosecutor improperly seeks to impeach a defendant with conduct for which the defendant has been acquitted?

2. Whether there should be a different harmless error test applied when a defendant's credibility has been improperly attacked; specifically, should a court focus upon the impact the improper impeachment effort had upon the defendant's credibility, rather than focus upon whether the government's proof was overwhelming?

## LIST OF PARTIES

Petitioner was indicted and tried alone.

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## TABLE OF AUTHORITIES

*Cases:*

*Constitutional Provisions, Statutes & Rules*

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PHILIP SCHWAB,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Philip Schwab respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on September 28, 1989, affirming petitioner's conviction for bribing and offering a bribe to a public official.

## OPINIONS BELOW

The opinion of the Court of Appeals is reprinted in the Appendix at pages 1a-11a. The order of the Court of Appeals denying petitioner's petition for rehearing appears in the Appendix at pages 12a-13a.

## JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on September 28, 1989. A timely petition for rehearing was denied on November 14, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION

The Fifth Amendment of the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

On September 28, 1989, the United States Court of Appeals for the Second Circuit affirmed the order of the United States District Court for the Eastern District of New York (Nickerson, D.J.), convicting defendant Philip Schwab of bribing and offering to bribe a public official. *United States v. Schwab*, ___ F.2d ___, No. 89-1048 (2d Cir. September 28, 1989).

As set out below, Schwab contends that the Court of Appeals, after finding that the prosecutor had improperly cross-examined Schwab about alleged misconduct for which he had been cleared, misconstrued the nature of the harmless error analysis it was then required to undertake. Specifically, we contend that the Court of Appeals (a) failed to apply the "harmless beyond a reasonable doubt" that should be applied when a defendant's right to present his case to the jury has been unfairly impaired, and (b) erroneously considered the impact of the prosecutor's misconduct in the context of the entire trial evidence instead of in the context of the other impeachment of the defendant's testimony.

## STATEMENT OF THE FACTS

The general facts of this case are set out in the Court of Appeals opinion, and do not need to be repeated here. For the purposes of this petition, only a few specific items need be mentioned.

1. The government alleged that Schwab had paid $25,000 to Howard Stecker, an Environmental Protection Agency official, so that Stecker would overlook the alleged fact that Schwab's demolition company had not complied with government regulations on asbestos removal.

2. Schwab testified in his own behalf, *and unequivocally denied having offered or made such a payment.*

3. Cross-examination of Schwab focused on only three areas:

a. Schwab's methods of conducting business so as to minimize his liability for taxes and judgments (*See, e.g.*, T:500-17)[1];

b. Schwab's explanation for a tape-recorded conversation with Stecker (*See, e.g.*, T:528 *et seq.*); and

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[1] Numbers preceded by the letter "T" refer to pages of the trial transcript.

> c. Whether Schwab had committed perjury in 1965 and tax fraud in 1970. (2a.)

> 4. The prosecutor knew that Schwab had been acquitted of the 1970 tax fraud charges, and that the 1965 perjury charges had been dismissed. (3a.)

> 5. The prosecutor also sought to impeach other defense witnesses by asking them whether they had committed fraud. (9a-10a.)

In affirming Schwab's conviction, the Court of Appeals agreed that the prosecutor had acted improperly when he cross-examined Schwab on the fraud and perjury allegations of which Schwab had been cleared. Nonetheless, the Court found the error to be harmless:

> Though the cross-examination of the defendant was improper, we are satisfied that the error was harmless. Schwab denied the misconduct, and no evidence was introduced to dispute his denials. Moreover, the trial judge promptly issued appropriate instructions. Most significantly, the evidence of guilt, which included Schwab's incriminating conversations, was overwhelming.

(9a.)

## REASONS FOR GRANTING THE WRIT

In making its harmless error finding, the Court did not specify whether it was employing the "harmless beyond a reasonable doubt" test applicable in cases of Constitutional error, *Chapman v. California*, 386 U.S. 18, 23-24 (1967), or if its inquiry was limited to the non-constitutional error test of whether the error "influence[d] the jury, or had but a very slight effect...." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946); *United States v. Ruffin*, 575 F.2d 346, 358-59 (2d Cir. 1978).

Since the Court's opinion here ultimately rested upon its conclusion that Fed. R. Evid. 608(b) was violated, we assume that it employed the *Kotteakos* non-constitutional harmless error test. We base this assumption upon *United States v. Smith*, 727 F.2d 214 (2d Cir. 1984), in which the Court employed the *Kotteakos* test where extrinsic proof of the defendant's misappropriation of stock had been admitted in violation of Rule 608(b). 727 F.2d at 221; *see also United States v. Peterson*, 808 F.2d 969, 976 (2d Cir. 1987). Whatever the wisdom of *Smith*, in which the defendant denied *truthful* allegations of misconduct, it should not be applied here. Rather, the "harmless beyond a reasonable doubt" test should be employed because the error in this case was of Constitutional dimension.

There is a fundamental difference between (a) a case, such as *Smith*, where Rule 608 is violated by the prosecution's improper introduction of *truthful* extrinsic evidence of specific acts bearing on credibility, and (b) a case, such as this one, where Rule 608 is violated because the prosecutor asks about conduct for which the defendant has been *acquitted*. In the latter situation, a defendant is

unfairly forced to face again charges upon which he has once prevailed.

It is worth noting that this Court has agreed to consider the appropriate harmless error analysis to be employed when the government, pursuant to Fed. R. Evid. 404(b), offers evidence of acts for which the defendant has been acquitted. *United States v. Dowling*, 855 F.2d 114 (3rd Cir. 1988), *cert. granted, Dowling v. United States*,___ U.S. ___, 109 S.Ct. 1309 (1989). If, as this Court has recognized by accepting the *Dowling* case, there is an issue as to whether the "harmless beyond a reasonable doubt" standard applies where the government offers evidence under Rule 404(b), there can be no doubt that impeachment of the type pursued here violates a defendant's Constitutional rights.

In essence, prosecutorial tactics such as the one used here deprive a defendant of his fundamental Constitutional right to present his side of the case unencumbered by innuendos and allegations of which our legal system has vindicated him. Surely, the Constitutional right to testify necessarily entails the right to have a fair picture of the defendant's credibility presented to the jury. This being so, improper impeachment of the sort attempted here must be analyzed as Constitutional error.

This is the approach adopted by the Fifth Circuit in *United States v. Turquitt*, 557 F.2d 464 (5th Cir. 1977). In *Turquitt*, the defendant was impeached with questions and evidence relating to an alleged crime for which he had never been charged or convicted. Employing the "harmless beyond a reasonable doubt" test, the Court reversed on the ground that "no witness may be impeached by evidence of any prior specific misconduct or crime for which he has not been convicted." 557 F.2d at 471.

Support for our claim here is also found in those cases which hold that where a defendant is impeached by a conviction that is Constitutionally infirm, an appellate court must reverse his conviction unless it finds the improper impeachment to have been harmless beyond a reasonable doubt. *See Burgett v. Texas*, 389 U.S. 109, 115 (1967); *Zilka v. Estelle*, 529 F.2d 388, 391 (5th Cir.), *cert. denied*, 429 U.S. 981 (1976). *A fortiorari*, if the use of an unconstitutional *conviction* to impeach a defendant must be reviewed under the "harmless beyond a reasonable doubt" standard, that same standard must apply when a defendant is impeached with questions about conduct for which he was *acquitted*.

In our view, the Court of Appeals, as evidenced by its silence on the issue, failed to apply the correct harmless error test here. This fact in itself requires reconsideration of the case. However, in addition, we maintain that, regardless of which test was employed, the Court erred in focusing on the alleged overwhelming nature of the government's evidence instead of the impact that the improper questions had upon Schwab's credibility. As the Court of Appeals itself noted, "[w]hen the witness is the defendant, the significance of the prejudice [caused by improper impeachment] is magnified." (7a.)

A defendant's decision to take the stand in his own defense is an extraordinary event that transforms a criminal trial. In the normal case, where a defendant does not testify, the defense focuses solely upon the claimed weaknesses in the government's case. In such cases, it is appropriate for a court to separate out the erroneous evidence, and then conclude that there was so much other evidence that the jury's verdict would not have been affected.

However, where, as here, the defendant does testify and explicitly denies the government's allegations, the trial is transformed into a credibility contest. The government could have mountains of evidence -- indeed so much that losing some of it to a proper ruling would not hurt its case substantially. Yet, all of that evidence becomes virtually irrelevant if the jury chooses to believe the defendant's account of what transpired. As every trial lawyer and judge knows, acquittals have been won in the face of staggering amounts of evidence simply because the jury was swayed by the defendant's sincere demeanor. Put simply, if a jury chooses to believe a defendant's testimony, they will acquit him.

It is for this reason that improper impeachment of a defendant should not be judged in relation to the amount of the government's proof. Rather, a reviewing court should focus upon whether it can be sure beyond a reasonable doubt that the jury's assessment of the defendant's credibility was not affected by the improper impeachment. In other words, can the Court be sure beyond a reasonable doubt that the jury would have rejected the defendant's testimony even if the prosecutor had acted properly?

The only way to answer this question is to consider the improper impeachment solely with respect to the other impeachment of the defendant's testimony. If the Court finds that the rest of the impeachment was so devastating that the jury would not have been swayed in the least by the improper suggestion that Schwab had committed perjury and fraud, it should affirm the Second Circuit's decision. If, on the other hand, it cannot be sure of this conclusion beyond a reasonable doubt, it must reverse.

We contend that the Court cannot avoid a reasonable doubt here. The best proof of this is the rest of the cross-examination of Mr. Schwab, which did not mortally wound him. It is more than reasonable to assume that a death blow was dealt here by the suggestion that Schwab had committed perjury and fraud in the past. Although the trial court gave a bland instruction to the effect that questions are not evidence (T:524), time and experience have taught us that instructions cannot always cure prejudice that arises during a trial. *See, e.g. United States v. Figueroa*, 618 F.2d 934, 946 (2d Cir. 1980). Moreover, it must also be recognized that the prosecutor asked other defense witnesses about their own involvement in fraud. Although these allegations were denied, the picture presented to the jury was of a defense case littered with liars and cheats.

In sum, then, this is a case where the Court of Appeals properly found error in defendant's trial, but then erred itself in considering the effect of that error.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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# APPENDICES

## Appendix A
## Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1360 -- August Term 1988

Argued: June 1, 1989 Decided: September 28, 1989

Docket No. 89-1048

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UNITED STATES OF AMERICA,
*Appellee,*

v.

PHILIP SCHWAB,
*Defendant-Appellant.*

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Before: KAUFMAN, NEWMAN, and MINER,
*Circuit Judges.*

Appeal from a judgment of the District Court for the Eastern District of New York (Eugene H. Nickerson, Judge) convicting defendant, upon a jury verdict, of bribing and offering to bribe a public official, in violation of 18 U.S.C. § 201(b)(1)(A) (Supp. V 1987).

Affirmed.

Michael Washor, New York, N.Y. (Washor, Greenberg & Washor, New York, N.Y.; Leonard W. Yelsky, Angelo F. Lonardo, Yelsky & Lonardo Co., Cleveland, Ohio, on the brief), for defendant-appellant.

George B. Daniels, Asst. U.S. Atty., Brooklyn, N.Y. (Andrew J. Maloney, U.S. Atty., John Gleeson, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for appellee.

*Appendix A*
*Opinion of United States Court of Appeals*

JON O. NEWMAN, *Circuit Judge*:

The principal issue on this appeal is whether a prosecutor may seek to impeach a defendant's credibility by asking the defendant on cross-examination about prior misconduct that the prosecutor knows has been the subject of a trial and an acquittal. The issue arises on an appeal by Philip B. Schwab from a judgment of the District Court for the Eastern District of New York (Eugene H. Nickerson, Judge), convicting him, upon a jury verdict, of bribing and offering to bribe a public official, in violation of 18 U.S.C. § 201(b)(1)(A) (Supp. V 1987). We conclude that the cross-examination was improper but harmless error under the circumstances of this case. We therefore affirm.

The evidence overwhelmingly established that Schwab paid $25,000 to a compliance officer of the United States Environmental Protection Agency and offered to pay him an additional $25,000. Schwab paid the money to the EPA officer to overlook the fact that Schwab's demolition company had not complied with regulations governing asbestos removal. The evidence included tape recordings of conversations between Schwab and the EPA officer.

On appeal, Schwab contends that he should receive a new trial because of the prosecutor's cross-examination of himself and two defense witnesses. On cross-examination, the prosecutor asked Schwab: "[I]sn't it a fact that you committed income tax fraud in 1970?" and "Isn't it a fact that you committed perjury in October of 1965?" Schwab answered "No" to both questions. At a sidebar conference after these questions were asked and answered, defense counsel informed Judge Nickerson that the defendant had been tried and acquitted on the tax fraud and perjury charges and moved for a mistrial. Counsel also reported that he had previously informed the prosecutor of the acquittals. The perjury charge in

fact had resulted in a dismissal. *See People v. Schwab*, 62 Misc. 2d 786, 310 N.Y.S.2d 436 (Erie County Ct. 1970).[1] The Government has not denied, either at trial or on appeal, that it had previously been informed that both charges had been resolved favorably to Schwab. The judge then said to the prosecutor, "You never told me that he was acquitted of the income tax fraud." The prosecutor replied that he did not think it was "significant."[2] Judge Nickerson denied the mistrial motion, but promptly instructed the jury that, though there had been questions asked about tax fraud and perjury, "[t]here's no evidence in the record of that at all. Please disregard that. Remember the questions aren't evidence."

Rule 608(b) of the Federal Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

In the Government's view, the prosecutor was entitled to ask the defendant whether he had committed tax fraud and perjury, notwithstanding the acquittal on the first charge and the dismissal of the second. The Government acknowledges that the prosecutor would be bound by the answers in the sense that he could not dispute denials with extrinsic evidence.

In analyzing the issue, it will be helpful to distinguish among the various purposes for which prior misconduct may have evidentiary value. First, the misconduct may be relevant to an issue in the case, such as intent or identity. When offered for that purpose, prior misconduct

s governed by Fed. R. Evid. 404(b). Second, the misconduct may be relevant to impeachment of a witness, including the defendant, because it tends to show the character of the witness for untruthfulness. When offered for that purpose, prior misconduct is governed by Fed. R. Evid. 608(b), which precludes proof by extrinsic evidence and limits the inquiry to cross-examination of the witness. Third, the misconduct may be relevant to impeachment of a witness on some ground other than the character of a witness for untruthfulness. The most typical example is misconduct offered to show bias of the witness. When offered for that purpose, misconduct is not limited by the strictures of Rule 608(b). *See United States v. James*, 609 F.2d 36, 45-46 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). The pending case falls within the second category, but unlike the typical situation where a witness, including a defendant, is cross-examined about uncharged misconduct, Schwab was cross-examined about alleged misconduct -- tax fraud -- for which he had been charged, tried, and acquitted.

An acquittal establishes that the defendant's perpetration of the charged misconduct has not been proven beyond a reasonable doubt. It is therefore arguable that whether the misconduct occurred may be inquired about within the constraints of Rule 608(b) and Rule 403 since the reasonable doubt standard applies to the jury's ultimate determination of guilt and does not apply to its assessment of each subsidiary fact that may contribute to that determination, such as the credibility of the defendant. *See United States v. Viafara-Rodriguez*, 729 F.2d 912, 913 (2d Cir. 1984); *United States v. Valenti*, 134 F.2d 362, 364 (2d Cir.), *cert. denied*, 319 U.S. 761 (1943). This argument has had a mixed reception in the various contexts in which it has been made.

Where prior misconduct has been offered to prove a fact significant to the establishment of guilt, the cases

are divided as to whether a prior acquittal bars the evidence. *Compare United States v. Dowling*, 855 F.2d 114, 120-22 (3d Cir. 1988) (barring evidence but error harmless), *cert. denied*, 109 S. Ct. 1309 (1989); *United States v. Keller*, 624 F.2d 1154 (3d Cir. 1980) (barring evidence); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979) (same); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1979) (same); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972) (same); and *United States v. Kramer*, 289 F.2d 909, 913-18 (2d Cir. 1961) (same), *with United States v. Van Cleave*, 599 F.2d 954, 956-57 (10th Cir. 1979) (allowing evidence); *Oliphant v. Koehler*, 594 F.2d 547, 550-55 (6th Cir.) (same), *cert. denied*, 444 U.S. 877 (1979); *United States v. Etley*, 574 F.2d 850, 852-53 (5th Cir.) (same), *cert. denied*, 439 U.S. 967 (1978); *United States v. Rocha*, 553 F.2d 615 (9th Cir. 1977) (same); *United States v. Kills Plenty*, 466 F.2d 240, 243 (8th Cir. 1972) (same), *cert. denied*, 410 U.S. 916 (1973); *United States v. Castro-Castro*, 464 F.2d 336 (9th Cir. 1972) (same), *cert. denied*, 410 U.S. 916 (1973); and *United States v. Feinberg*, 383 F.2d 60, 71-72 (2d Cir. 1967) (same), *cert. denied*, 389 U.S. 1044 (1958). *Cf. Lee v. United States*, 368 F.2d 834 (D.C. Cir. 1966) (reversing conviction where extrinsic evidence was introduced to impeach defendant's denial of prior misconduct for which he had been tried and acquitted).

Some of the cases do not stand in quite the stark opposition that the above listing might indicate since particular circumstances, rather than a general rule, contributed to the outcomes. *See, e.g., United States v. Feinberg, supra* (collateral estoppel inapplicable because prosecuting sovereigns were different and uncertainty existed as to whether prior acquittal had conclusively established the fact subsequently sought to be proved). We have cast considerable doubt on the pertinence of the difference in standards of proof in the prior and subsequent proceedings, *see United States v. Kramer*, 289 F.2d at 913, although the Supreme Court case relied upon,

*Coffey v. United States*, 116 U.S. 427 (1886), was accorded perhaps more weight than was warranted. *But see United States v. Etley*, 574 F.2d at 853 (allowing evidence of prior crime resulting in acquittal because of difference in standards of proof). It is not entirely clear whether the decisions precluding use of prior acts resulting in an acquittal are grounded on technical application of collateral estoppel, which might limit the preclusion to instances where the same sovereign prosecuted both cases, or rest on more general considerations of fairness, *see, e.g., United States v. Mespoulede*, 597 F.2d at 335 ("simply . . . inequitable"); *Wingate v. Wainwright*, 464 F.2d at 215 ("fundamentally unfair and totally incongruous with our basic concepts of justice").

In the context of sentencing, where prior misconduct is offered not to prove guilt but solely to determine the extent of punishment, we have ruled that a sentencing judge may take into account evidence of a defendant's prior misconduct established by a preponderance of the evidence, notwithstanding an acquittal. *See United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972). But the sentencing context is entirely different from the context of cross-examination of a defendant during trial. At sentencing, the facts concerning the prior misconduct may be developed by extrinsic evidence, and the judge may take evidence of the misconduct into account if satisfied that it has been established by a preponderance of the evidence, despite the fact that a jury was not persuaded beyond a reasonable doubt. However, when witnesses are cross-examined as to alleged prior misconduct for which they have been tried and acquitted, there is no opportunity to present extrinsic evidence bearing on whether the misconduct occurred.

The trial context, in which prior misconduct is offered to prove a fact relevant to a subsequent prosecution, is more pertinent to the issue in this case than is the sentencing context. Though the prior misconduct

was sought to be elicited in this case to impeach the defendant's credibility rather than prove a fact such as intent or knowledge, there is a strong argument that the same considerations that precluded the evidence in *Mespoulede* should bar it here.

However, we need not rest decision on collateral estoppel nor on more general considerations of fundamental fairness since the evidence is inadmissible under the standards of Rules 608(b) and 403. Rule 608(b) provides that specific instances of misconduct may be inquired into on cross-examination "in the discretion of the court, if probative of truthfulness or untruthfulness." Rule 403 obliges the trial judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," among other factors. Both rules thus require the exercise of discretion with respect to admission of prior acts of misconduct. Whether or not an acquittal technically estops the prosecution from eliciting the fact of prior misconduct, it will normally alter the balance between probative force and prejudice, which is already a close matter in many cases where prior misconduct of a defendant is offered. *See United States v. Phillips*, 401 F.2d 301 (7th Cir. 1968). Moreover, there is the blunt reality that a witness who has been acquitted will almost certainly deny the misconduct, either because he did no wrong or because he may understandably believe that when asked about it after an acquittal, he is entitled to have the law regard him as innocent. Thus, the only purpose served by permitting the inquiry is to place before the jury the allegation of misconduct contained in the prosecutor's question, an allegation the jury will be instructed has no evidentiary weight. To permit the inquiry risks unfair prejudice, which is not justified by the theoretical possibility that the witness, though acquitted, will admit to the misconduct. When the witness is the defendant, the significance of the prejudice is magnified.

*Appendix A*
*Opinion of United States Court of Appeals*

In the pending case, not only had the alleged prior misconduct concerning the tax charge resulted in an acquittal, but the matter had arisen eighteen years prior to the trial at which it was sought to be probed on cross-examination. Moreover, the prosecutor had no information in his possession to indicate that Schwab was guilty of the misconduct. Under these circumstances, cross-examination concerning the tax matter was beyond the discretion confided in the trial judge by Rules 608(b) and 403.

The prosecutor was at fault in this case not only for cross-examining as to matters for which the defendant had been tried and acquitted but also for pursuing the inquiry without alerting the trial court, either by pretrial memorandum or sidebar conference, of his intended course. Since, as far as we can ascertain, no decision has approved cross-examination of this sort, it was extremely imprudent for the prosecutor to preempt the trial judge's opportunity to consider, before any damage might be done, whether to allow such novel questioning. The failure to alert the trial judge is especially serious since the prosecutor had been told about the acquittal and had no contrary information. Had the prosecutor known only of the charges and not the outcome, it would still have been prudent to raise the matter at sidebar so that the trial judge could decide whether to conduct a voir dire inquiry as to the outcome of the charges.

The significance of the prosecutor's omission is compounded still further by the fact that the matters the prosecutor inquired about were charges made twenty-three and eighteen years prior to the trial. If these matters had resulted in convictions, the fact that such convictions would have been more than ten years old would have required the prosecutor to give the defendant notice of his intent to use them, Fed. R. Evid. 609(b), and the trial judge could have admitted them only upon an explicit finding that their probative value substantially

outweighed their prejudicial effect, *id.* Though Rule 608(b) has no ten-year rule comparable to Rule 609, the discretion that trial judges are obliged to use in deciding whether to permit cross-examination concerning ancient misconduct cannot be exercised before the well has been poisoned unless the prosecutor alerts the judge by an offer of proof out of the hearing of the jury.[3]

Though the cross-examination of the defendant was improper, we are satisfied that the error was harmless. Schwab denied the misconduct, and no evidence was introduced to dispute his denials. Moreover, the trial judge promptly issued appropriate instructions. Most significantly, the evidence of guilt, which included Schwab's recorded incriminating conversations, was overwhelming.

Appellant's objection to the cross-examination of two defense witnesses is not cause for concern. With respect to the first witness, Martin Haitz, the prosecutor, not previously alerted to the identity of the witness, initiated an investigation while Haitz was testifying and learned that criminal charges of fraud and larceny had been brought against him; the investigation did not ascertain the ultimate disposition. The prosecutor alerted the trial judge to his proposed cross-examination and received approval to inquire pursuant to Rule 608(b). Haitz testified that fraud charges based on the issuance of bad checks had been brought against him, but that the charges were dropped after he explained that the checks were issued by a corporation after he had sold it. Though it might have been preferable for the District Judge to have elicited the testimony out of the presence of the jury so that the judge could make the Rule 403 assessment before permitting the cross-examination, we cannot say that it was error not to do so.

With respect to the second witness, Robert Gibbs, the prosecutor also learned, apparently while the witness

was testifying, that an FBI "rap" sheet indicated criminal charges, including mail fraud, arising out of Gibbs' alleged embezzlement from a bank. At a sidebar conference, the prosecutor, who had not yet obtained a fax copy of the "rap" sheet, said there "may" be a conviction; defense counsel said there had been an acquittal. Judge Nickerson permitted cross-examination. Gibbs denied embezzling funds from a Florida bank that had employed him, admitted agreeing to a judgment to repay some $253,000 to a different Florida bank, and said that the repayment had nothing to do with his bank employment. He denied committing mail fraud in connection with either bank. On redirect, Gibbs said he had never been convicted of any federal or state crime. Nothing in the record supports defense counsel's claim at sidebar that Gibbs had been tried for a banking crime and found not guilty.

As with the cross-examination of Haitz, we see no error. The prosecutor had a plausible basis for cross-examining as to prior misconduct and did so within the limits of Rule 608(b).

Appellant's remaining contentions, which do not warrant discussion, are without merit.

The judgment of the District Court is affirmed.

*Appendix A*
*Opinion of United States Court of Appeals*

*FOOTNOTES*

[1] In the state court case, Schwab was indicted for three counts of perjury, two concerning allegedly false testimony given in March 1963 in a civil suit and one concerning allegedly false testimony given before a county grand jury in October 1963. The first two counts were dismissed in 1970 because Schwab had unlawfully been required to waive immunity before the grand jury that indicted him. *People v. Schwab, supra.* The third count was dismissed in 1972 on motion of the district attorney because of the "time lapse and trial history," which included two mistrials. *People v. Schwab*, No. 30,893 A & B, order dismissing action at 2 (Sup. Ct. Feb. 8, 1972).

[2] The prosecutor's view that the acquittal lacked significance evidently persists on appeal: In arguing that cross-examination concerning the tax fraud charge was proper, the Government's brief makes no mention of the acquittal. Indeed, the Government does not distinguish itself by stating, "Schwab had a criminal record indicating tax fraud and perjury." Brief for Appellee at 15.

[3] In enacting Rule 608(b), Congress deleted the limitation in the rule as submitted by the Supreme Court that the prior misconduct not be "remote in time," and instead left the matter of timeliness to "the discretion of the court." H.R. Rep. No. 650, 93d Cong., 1st Sess. 10 (1973).

## Appendix B
## Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of November, one thousand nine hundred and eighty-nine.

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FILED: November 14, 1989

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Docket Number 89-1048

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UNITED STATES OF AMERICA,

*Appellee,*

-against-

PHILIP SCHWAB,

*Defendant-Appellant.*

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, Philip Schwab,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

*Appendix B*
*Order of United States Court of Appeals*
*On Petition for Rehearing and Suggestion for*
*Rehearing In Banc*

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
ELAINE B. GOLDSMITH
Clerk